

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION II**

J.A. PHELPS, D.V.M. and KATARINA)	
S. PHELPS, Husband and Wife,)	Case No. 2CA-CV 2010-0052
)	
)	Santa Cruz County Superior
)	Court Case No. CV200800174
Appellants,)	
)	
v.)	
)	
THOMAS J. GILBRAITH and)	
AUDREY J. WYSTRACH, D.V.M.,)	
Husband and Wife; JOHN DOES I-V;)	
JANE DOES I-V; ABC)	
CORPORATION; MNO)	
PARTNERSHIP; RST LIMITED)	
LIABILITY COMPANY; and XYZ)	
ASSOCIATIONS,)	
)	
)	
)	
Appellees.)	
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**APPELLANTS' REPLY TO APPELLEES' OPPOSITION TO
APPELLANTS' MOTION FOR REHEARING**

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¶1 Come now Appellants, by and through counsel undersigned, and hereby submit their Reply to Appellees' Opposition to Appellants' Motion for Rehearing.

¶2 Appellants are unaware of any authority, and Appellees cite to none, that prohibits Appellants from filing a motion requesting a rehearing after it was discovered that the Court did not have the full record before it and which, in fact, Appellants had submitted. "An application for an order or other relief shall be made by filing a motion." Rule 6(a)(1), Ariz. R. Civ. App. P. Pursuant to Rule 3, Ariz. R. Civ. App. P., the Court may "upon motion, for good cause shown, suspend the requirements or provisions of any of these rules in a particular case, and may order proceedings in accordance with its direction. *These rules shall be liberally construed in the furtherance of justice.*" (Emphasis added). It is unclear why Appellees would advocate limiting the Court's ability to make an informed decision. *See* Appellees' Opposition to Appellant's Motion for Rehearing (hereinafter "Appellees' Opposition"), ¶ 4 ("even if Appellants had submitted transcripts with their Reply, Arizona law forbids this Court from considering such."). Such a stance undermines the purpose of the Courts to make an equitable

decision based on all the information before it. The unabridged transcripts complete the record; they are neither argument nor a new issue.

¶3 Pursuant to Rule 11(b)(1), Ariz. R. Civ. App. P., it was Appellants' belief that the appellant may order a certified copy of the transcript "as the appellant deems necessary for the inclusion in the record." Appellants appealed the trial court's denial of their Motion for New Trial regarding its finding that Appellants were not damaged by Appellees' breach and denying Appellants' their attorney's fees and costs. Appellants supported the issues raised in their Opening Brief with citations to case law, to secondary authorities, and to the record pursuant to Rule 13(a)(6), Ariz. R. Civ. App. P. At the time, Appellants did not believe the trial transcripts were necessary because the trial court's findings of fact and conclusions of law that Appellants were appealing were found in the Judgment and in the trial court's denial of Appellants' Motion for New Trial which was part of the record included from the trial court.

¶4 Upon Appellees' citing to select portions of the trial transcripts in their Answering Brief, Appellants ordered certified copies of the trial transcripts¹ and filed them along with their Reply Brief. Appellants did not present new evidence

¹See Appellants' Motion for Extension of Time to File Reply Brief filed August 12, 2010, and Appellants' Reply to Appellees' Opposition to Appellants' Motion for Extension of Time to File Reply Brief filed August 13, 2010.

in their Reply Brief. Because the Appellee cited to select portions of the trial transcripts, Appellants obtained the transcripts to respond to Appellees' arguments – which is the purpose of a reply brief. *See* Rule 13(c), Ariz. R. Civ. App. P. (“The appellant may file a reply brief, but it shall be confined strictly to rebuttal of points urged in the appellee’s brief.”).

¶5 Appellants submitted certified copies of the transcripts on August 27, 2010, with the filing of their Reply Brief. On August 30, 2010, the Court ordered the superior court to transmit the record on appeal pursuant to Rule 11(a)(3), Ariz. R. Civ. App. P., and on September 21, 2010, the appeal was deemed “at issue.” Accordingly, the Court had copies of the trial transcripts before the appeal was “at issue,” before the Draft Decision was released, and before oral argument was heard.

¶6 Despite Appellees' erroneous contention, Appellants are not requesting a rehearing in order to add the trial transcripts; in the furtherance of justice, Appellants are requesting that a rehearing take place because, through no fault of Appellants, the Court did not have the complete record before it, even though Appellants had filed the transcripts before the case was at-issue.

¶7 Appellants take issue with Appellees’ inaccurate representation of events.²

It is a fact – which has been resolved – that Appellants submitted the trial transcripts before the case was at-issue. Appellees claim that Appellants did not submit trial transcripts with their Reply Brief. Appellees’ Opposition, ¶ 4.

Appellants respectfully suggest that Appellees review the attachment “View e-Filings of Documents Filed by Robert D. Stachel, Jr.” filed as Appendix to Motion for Rehearing where it shows that the trial transcripts were filed at the same time as Appellants’ Reply Brief, August 27, 2010.

¶8 Appellees accuse Appellants of not being truthful to the Court – a serious charge and one that Appellants refute unequivocally. *See* Appellees’ Opposition, ¶ 5. It is true that Appellants avowed to the Court at oral argument that the transcripts were filed and did so because Appellants had confirmed that fact with the Clerk’s Office prior to oral argument. *See* Appellants’ Motion for Rehearing, ¶¶ 2-5. The Appellants had no reason to believe that the Court did not have the transcripts until the October 29, 2010 Memorandum Decision was released and the Court repeated its charge that Appellants had not provided the

²Appellants make no comment regarding Appellees’ charge that “Appellants’ Motion is devoid of any legal authority whatsoever” when Appellants cited to seminar materials authored by the Honorable Judge William Brammer, Jr. and Ms. Beth Beckmann. Appellees’ Opposition, ¶ 2.

transcripts when the e-filing record showed that Appellants had. *See* “View e-Filings of Documents Filed by Robert D. Stachel, Jr.” filed as Appendix to Motion for Rehearing. A more careful, thoughtful reading of Appellants’ Motion for Rehearing would do much to clarify Appellees’ misunderstandings and avoid unnecessary responses which take up the Court’s time.

¶9 WHEREFORE, Appellants respectfully request the Court take nothing by Appellees’ Opposition to Appellants’ Motion for Rehearing and grant Appellants’ request for a rehearing so that the Court can consider the complete record before it and permit oral argument so that Appellants have a chance to respond to any questions of the Court.

RESPECTFULLY SUBMITTED this 1st day of December, 2010.

CARDINAL & STACHEL, P.C.

/s/
Robert D. Stachel, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF Systems for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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/s/